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In the Supreme Court of the United States

OCTOBER TERM, 1979

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, PETITIONER

v.

DONNY BRURELL BUCKLEY, ET AL.

OTIS R. BOWEN, GOVERNOR OF THE STATE OF INDIANA, ET AL., PETITIONERS

v.

DONNY BRURELL BUCKLEY, ET AL.

METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA, ET AL., PETITIONERS

v.

DONNY BRURELL BUCKLEY, ET AL.

THE SCHOOL TOWN OF SPEEDWAY, ET AL., PETITIONERS,

v.

DONNY BRURELL BUCKLEY, ET AL.

HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA, PETITIONER

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., CROSS-PETITIONERS

v.

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, ETC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
DREW S. DAYS, III
Assistant Attorney General
BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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DONNY BRURELL BUCKLEY, ET AL.

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v.

DONNY BRURELL BUCKLEY, ET AL.

No. 80-99

THE SCHOOL TOWN OF SPEEDWAY, ET AL., PETITIONERS,

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I

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the lower courts' findings that actions of the state legislature and metropolitan housing agencies were discriminatorily motivated.

2. Whether substantial evidence supports findings that those discriminatory actions had substantial interdistrict effects.

3. Whether the district court abused its discretion in selecting a plan to remedy those interdistrict effects.

4. Whether, in the circumstances of this case, the district court's reliance on the intentional interdistrict effects of discriminatory housing decisions invalidates the remedial order.

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OPINIONS BELOW

The February 14, 1978, opinion of the court of appeals remanding the case for further proceedings is reported at 573 F.2d 400. The July 11, 1978, opinion of the district court is reported at 456 F. Supp. 183. Neither the April 24, 1979, opinion of the district court, nor the April 29, 1980, opinion of the court of appeals, is reported.

JURISDICTION

The judgment of the court of appeals was entered April 29, 1980. The petitions were filed as follows: No. 79–1975 was filed on June 16, 1980; No. 79–2001 was filed on June 19, 1980; No. 79–2067 was filed on June 28, 1980; No. 80–99 was filed on July 23, 1980; No. 80–115 was filed on July 25, 1980; No. 80–129 was filed on July 28, 1980. All invoke this Court's jurisdiction under 28 U.S.C. 1254(1).[1]

STATEMENT

1. *Background*

The United States' complaint in this case, filed on May 31, 1968, alleged that the Indianapolis public school system (IPS) was racially segregated. That school system was then coterminous with the boundaries of the City of Indianapolis, located in Marion County, Indiana. On August 18, 1971, the district court held that IPS was unlawfully segregated (332 F. Supp. 655).[2] However, the district

[1] Petitioner in 79–1975 will be referred to as "Perry Township"; petitioners in 79–2001 as "the State"; petitioners in 79–2067 as "Lawrence Township"; petitioners in 80–99 as "Speedway"; petitioner in 80–115 as "Housing Authority of Indianapolis" or "HACI"; and cross-petitioners in 80–129 as "Indianapolis School Commissioners" or "IPS".

[2] The court of appeals affirmed the holding (474 F.2d 81), and this Court denied certiorari (413 U.S. 920 (1973)).

court did not then order IPS to adopt a desegregation plan. The court stated that because IPS was 40% black, an intradistrict remedy for IPS would not promise stable desegregation (332 F. Supp. at 678). The court directed the parties and the Indiana General Assembly to consider an interdistrict desegregation plan and ordered the United States to add certain suburban school districts to the case (332 F. Supp. at 678–680).

In September 1971, the United States added as parties defendant the ten suburban districts located in Marion County. A few days later, Donny and Alycia Buckley, representing the class of black students in IPS, filed a complaint in intervention alleging that racially discriminatory acts justified an interdistrict remedy. Their complaint added as defendants the State of Indiana and several suburban districts located outside Marion County. IPS filed a cross-complaint against the Housing Authority of the City of Indianapolis (HACI), and the Metropolitan Development Commission (MDC), alleging that public housing projects in Marion County had been discriminatorily placed inside IPS.

On July 20, 1973, the district court held that interdistrict relief was appropriate (368 F. Supp. 1191), and directed the State of Indiana to devise a plan.[3] On August 21, 1974, the court of appeals remanded (503 F.2d 68) for reconsideration of the issues in light of this Court's intervening decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974). The court of appeals held that the school districts

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[3] As an interim intradistrict measure, the district court also ordered IPS to transfer students within its borders to establish a minimum black enrollment of 15% in each elementary school. The district court is considering plans for a limited amount of intradistrict relief for the school year beginning in September 1980, and the parties have agreed to consider steps for further intradistrict relief for the next school year. IPS Pet. 5 n.3.

located outside Marion County should be dismissed, and directed the district court to determine whether the expansion of the Indianapolis boundary to the Marion County line for nearly all governmental functions except schools supports interdistrict relief within the area of the expanded city (503 F.2d at 86).[4]

On August 1, 1975, the district court, after holding the third evidentiary hearing in this case, held that interdistrict relief within Marion County was permissible under *Milliken* (419 F. Supp. 180; Supp. App. A36). The district court held that the housing authority's decision to place all public housing projects within the boundaries of IPS segregated black students inside IPS and retained the nearly all-white status of the suburban school districts (419 F. Supp. at 182–183; Supp. App. A39–A40). The court also held that the decision to exclude schools from the Uni-Gov expansion of Indianapolis boundaries limited the ability of IPS to desegregate itself (419 F. Supp. at 183; Supp. App. A40–A41). The court noted that, with two exceptions, the suburban school districts had few black students (419 F. Supp. at 185; Supp. App. A44).[5] The court stated that an appropriate remedy would be to transfer enough blacks from IPS into suburban school districts to bring the enrollment in each suburban district to 15% black (419 F. Supp. at 185; Supp. App. A44–A45). The court also enjoined HACI from placing any new public housing inside the boundaries of IPS (419 F. Supp. at 186; Supp. App. A46).

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[4] In 1969, in a statute known as "Uni-Gov," the legislature expanded the boundaries of the City of Indianapolis to include all of Marion County, but excluded schools from the expansion (J.A. A8–A11).

[5] The two exceptions, the metropolitan school districts of Washington and Pike Townships, had approximately 15% and 12% black students respectively, and were accordingly not required to accept transfers from IPS (419 F. Supp. at 185; Supp. App. A44).

The court of appeals affirmed that decision on July 16, 1976 (541 F.2d 1211; Supp. App. A1). The court reviewed the evidence relating to both the location of public housing projects and the exclusion of schools from the Uni-Gov expansion of Indianapolis boundaries, and upheld the district court's finding that both activities supported interdistrict relief. The court noted that the Uni-Gov exclusion confined 95% of the black students in the county within the boundaries of IPS (541 F.2d 1220–1221; Supp. App. A18–A20.); the placement of all the housing projects inside the IPS boundaries also contributed to the racial disparity between the suburban and IPS schools (541 F.2d at 1222–1223; Supp. App. A22–A23).

On January 25, 1977, this Court "vacated [the case] for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, [429 U.S.] 252; and *Washington* v. *Davis*, 426 U.S. 229" (429 U.S. 1068).

2. *The Present Proceedings*

Following this Court's remand order, the court of appeals again reviewed the record (573 F.2d 400; J.A. A54) regarding both the Uni-Gov and housing practices to determine whether there was a predicate, under the standards of *Milliken*, *supra*, *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, for interdistrict relief. The court held that the legislature's decision not to expand the IPS boundary when the Indianapolis city line expanded under Uni-Gov "ensur[ed] that the effort to desegregate IPS (which had been initiated a year earlier by the Department of Justice) would not extend to the white suburban areas" (573 F.2d at 407; J.A. A65). If the retention of the pre-existing school boundaries was found to be intentionally discriminatory, the court held, it would provide a basis for interdistrict relief (573 F.2d at 408; J.A. A65).

The court also held that the housing evidence would support the interdistrict plan if the district court found that discriminatory state action significantly contributed to segregative housing patterns and population shifts (573 F.2d at 408–410; J.A. A67–A69). The court of appeals accordingly remanded the issue of discriminatory intent to the district court for findings (573 F.2d at 411; J.A. A65, A78).

On July 11, 1978, the district court entered its order on remand. The court held that the evidence supported a finding that the General Assembly acted "with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (J.A. A92). The court also held that the housing authority's decision to place all public housing within IPS, and the suburbs' opposition to such housing, "were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only" (J.A. A94).

The court stated that this Court's decision in *Dayton Board of Education* v. *Brinkman (Dayton I)*, 433 U.S. 406 (1977), required the court to determine the incremental effects of the proven discriminatory practices, and that the discrimination in public housing site selection kept about 7,000 black children within IPS (J.A. A97). The court therefore reordered the transfer remedy it had originally ordered in 1975, estimating that its plan would transfer about 6500 black students from IPS into the suburban school districts (J.A. A99–A100).

All of the suburban districts appealed the interdistrict order, and filed motions to stay the order. On August 11,

1978, the court of appeals remanded the case to permit the district court to address any alternative remedies the parties might submit (App. A, *infra*). IPS submitted to the district court alternative remedial plans that involved either transferring white students from the suburbs into IPS or consolidating all school districts in Marion County into one large district. Three suburban districts submitted plans for annexing areas of IPS. The court also received additional evidence relating to the interdistrict effects of the proven discrimination.

On April 24, 1979, the district court rejected all alternative plans (J.A. A101), and held that the evidence again supported its original transfer plan. The court stated that the public housing projects could have housed approximately 4,958 black students (*id.* at A106) who, had the projects been placed outside IPS, would have gone to suburban schools (*ibid.*). In addition, placing the projects in the suburbs would have "indirectly" encouraged other blacks to move beyond IPS (*id.* at A118). The court stated that although the effects of this indirect pull "cannot be demonstrated statistically" the total number of black children directly and indirectly affected by the discriminatory placement of public housing approximately equalled the number of black students ultimately to be transferred under the court's order from IPS to a suburban school (*ibid.*). The court stated that it could not statistically determine the incremental effects of the legislature's failure to expand the IPS boundaries with the Uni-Gov legislation (*id.* at A109).

On April 29, 1980, the court of appeals affirmed the district court's orders (J.A. A1). The court held that the district court's finding that discrimination played a part in the legislature's decision not to expand IPS boundaries

when the Indianapolis city line expanded was supported by the evidence and was not clearly erroneous. The court reviewed the evidence concerning the impact on the black population of the legislature's decision, the historical context of the legislation, the history of school and city boundaries in Indiana, the context and implications of other legislation passed simultaneously with Uni-Gov, and the timing of the Uni-Gov legislation (*id.* at A6–A11). The court concluded that the evidence established discriminatory intent under *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra* (J.A. A11).

The court also reviewed the evidence regarding the public housing authority's decision to place all housing projects within IPS (*id.* at A11), and held that the evidence supported the district court's finding of discriminatory intent (*id.* at A14–A15). The court reviewed evidence concerning the history of housing practices in the city and suburbs, the non-racial justifications for the sites selected, the "foreseeable results" of the site selections, and other discriminatory actions of the governmental agencies that played a role in site selection.

The court of appeals held that the interdistrict remedy appropriately addressed the impact of the constitutional violations. The court held that the district court misread *Dayton I* when it concluded that the interdistrict effects of Uni-Gov failed to support the order because they could not be calibrated. The court held that under this Court's opinions in *Dayton II* (*Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979)) and *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), "policies of systemwide application necessarily have systemwide impact" (J.A. A20), and that "incremental effects" findings are required only when "discrete isolated examples of discrimi-

nation are established" (*id.* at A20–A21). The court stated that the Uni-Gov action was necessarily systemwide, since it affected the entire Marion County area, and "not just certain schools or certain school districts within the city" (*id.* at A21). The court of appeals stated that the district court could have remedied the state's discriminatory refusal to expand IPS boundaries by consolidating all the districts in the newly defined city into one school district. However, the district court's transfer plan, the court held, adequately addressed the interdistrict effects of Uni-Gov and, by leaving the separate structure of IPS and suburban school districts intact, was a lesser intrusion into the local governmental structure (*id.* at A22).

The court of appeals stated that the discriminatory housing practices also supported the transfer plan. The housing policies "affected housing and school patterns throughout HACI's area of operation" (*id.* at A22). The court dismissed the suburban districts' challenge to the district court's statistical calculation of the precise number of children affected by the housing decision. The court of appeals stated that whether or not the calculation was perfect, the direct and indirect effects of the violation are not "so small that the violation can be said to be insignificant" (*id.* at A23).

Judge Tone dissented from the court's holding that the evidence supported the district court's findings that the Uni-Gov and HACI actions were discriminatorily motivated (*id.* at A30–A53).

ARGUMENT

The interdistrict aspect of this case has been carefully reviewed by the district court on four separate occasions[6]

[6]368 F. Supp. 1191; 419 F. Supp. 180; 456 F. Supp. 183 (Supp. App. A36); opinion of April 24, 1979 (J.A. A101).

and by the court of appeals on three separate occasions.[7] Each time, the court reviewed an extensive and growing factual record, compiled at five separate evidentiary hearings, which now totals nearly 7000 pages and 600 exhibits. On different occasions, the courts have considered the evidence under (a) *Milliken* v. *Bradley, supra,* which established the factual basis necessary for an interdistrict school remedy; (b) *Washington* v. *Davis, supra,* and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* which established that discriminatory intent must be proven and suggested methods of determining whether evidence proved motive; and (c) *Dayton I, supra,* and, more recently, *Dayton II, supra,* and *Columbus Board of Education* v. *Penick, supra,* which established that a remedy must be based on the court's findings of fact regarding the effects of the discrimination.

The case does not present any novel remedial issues; the limited remedy ordered here does not alter the existing governmental structure of the local school districts in Marion County. Cf. *Milliken* v. *Bradley, supra,* 418 U.S. at 741–744. Although several of the petitioners argue that a court is absolutely foreclosed from remedying the proven effects on school enrollments of discriminatory action taken by housing officials, rather than school officials, both the housing discrimination involved here and the Uni-Gov legislation were state action intended to have discriminatory effects on school enrollments. Nothing in this Court's decisions suggests that such intended effects are

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[7] 541 F.2d 1211, 573 F.2d 400, opinion of April 29, 1980 (J.A. A1).

beyond judicial correction. Cf. *Milliken* v. *Bradley*, *supra*, 418 U.S. at 717 (Stewart, J., concurring).

In sum, this case now presents little beyond purely factual matters which, we contend, were correctly decided. Because this Court usually declines to review factual matters on which both the district court and court of appeals concur, *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206 (1940); *Allen* v. *Trust Co.*, 326 U.S. 630 (1946); *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271 (1949), this case does not warrant further review.

1. The courts below held that discriminatory intent was a factor both in the state legislature's decision not to expand IPS boundaries as part of the Uni-Gov legislation, and in the housing officials' decision to limit all public housing projects to IPS boundaries. Both findings are supported by the evidence and were made following proper and careful consideration of the guidelines expressed in *Washington* v. *Davis*, *supra*, and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*.

a. *The Uni-Gov legislation was intended to prevent IPS from placing black children in suburban schools.*

The evidence supports the court's finding that the legislature's decision not to expand IPS boundaries when the city limits were extended was discriminatorily motivated. In 1970, just after Uni-Gov was enacted, IPS had less than 60% of the public school students in Marion County, but more than 97% of the county's black students (J.A. A6). The court of appeals held that this fact, along with the record of discrimination against blacks by the Indiana legislature, suburban governments, and private citizens in the suburban areas, although certainly not

enough to establish a discriminatory motivation, supplied a background against which the Uni-Gov legislation was to be reviewed (*id.* at A6–A7). The courts carefully reviewed the history of the legislature's policies regarding the relationship between city and school boundaries, and determined that before 1969 the legislature followed a "long-established, and recently reaffirmed, legislative determination that school boundaries, particularly in Marion County, should expand with civil city boundaries" (J.A. A10, A90). The legislature's 1969 decision to retain the IPS boundary while creating a new boundary for the civil city of Indianapolis was a departure from this long-standing policy (J.A. A10, A92). Sixteen days before Uni-Gov was enacted, the legislature amended existing laws in order to prevent IPS boundaries from expanding with Uni-Gov (J.A. A9), thus demonstrating the specific intent to prevent IPS boundaries from expanding to the Marion County line. In addition, the courts found, it was clear to the legislature that its decision would continue the growing racial disparity between IPS and the suburban school districts (J.A. A9, A91–A92). Finally, the court of appeals found it significant that the decision to retain the existing IPS-suburban school lines occurred just one year after the United States filed its suit against IPS, which made desegregation of IPS "likely" (J.A. A10). The legislature was aware, the court found, that had IPS boundaries expanded, the desegregation process was likely to place blacks in what had been white suburban schools.

The courts below thus considered several of the factors—a history of racial discrimination in the area, the history of the specific decision at issue, the racial impact of the decision, a sequence of events demonstrating both suspect timing and, more importantly, abandonment of a long-standing policy, and the foreseeable segregative

consequences—which, under both *Arlington Heights*, *supra*, and the more recent decision in *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979), demonstrate invidious motivation.

The suburban school districts argue that the courts' factual conclusions are incorrect. See Perry Township Pet. 15; Lawrence Township Pet.22–23; Speedway Pet.17,21. However, this Court "do[es] not ordinarily grant certiorari to review judgments based solely on questions of fact," *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 208 (1940), and the findings of discriminatory intent[8] entered here are not so exceptional as to suggest that this practice should not be observed in this case.[9]

The suburban school districts also suggest that the courts' holdings that excluding schools from Uni-Gov was discriminatory were implicitly based on holdings that the segregation within IPS created an obligation to desegregate IPS on an interdistrict basis (Perry Township Pet. 16; Lawrence Township Pet. 22). From this analysis they conclude that the interdistrict relief entered here was based solely on the segregation within IPS, and therefore violates *Milliken*, *supra*. That analysis of the holdings, however, is erroneous.[10] The interdistrict discrimination

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[8] Findings of discriminatory intent are findings of fact. See *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464 (1979), and at 470 (Stewart, J., concurring).

[9] Petitioner Lawrence Township also argues (Pet. 12, 16–19, 21) that the courts below erred in holding that, had the legislature not revised Indiana law prior to the enactment of Uni-Gov, the pre-existing legislation would have resulted in IPS boundaries that expanded with the municipal boundaries of Indianapolis. However, this Court usually defers to a federal district court's interpretation of the law of the state in which the district court sits, particularly when the court of appeals concurs in the interpretation. *Cort* v. *Ash*, 422 U.S. 66, 73 n. 6 (1975); *Bishop* v. *Wood*, 426 U.S. 341, 345–346 (1976).

[10] The court of appeals explicity recognized that the segregation within IPS required only intradistrict desegregation (J. A. A27–A28).

the court relied on was the legislature's decision to prevent the IPS boundary from expanding with Uni-Gov to the county line.[11] Although there may be situations in which inaction may prove to be discriminatory, see, *e.g.*, *City of Mobile* v. *Bolden*, No. 77–1844 (April 22, 1980), slip op. 18, n.21, this is not such a case.

b. *The location of public housing projects was intentionally discriminatory.*

Ample evidence also supports the findings of the courts below that discriminatory purpose motivated HACI to place all public housing projects within IPS (J.A. A14–A15, A93–94).[12] The history of residential discrimination designed to keep black people out of the suburbs formed the background for the courts' review of the public housing site selection policies (J.A. A14, A93). They reviewed the pattern of public housing placement, finding not only that all the projects built during the 1960's were placed within IPS boundaries, but also that many were actually placed within a few blocks of, or even directly on, the boundary separating IPS and the suburbs. On one occasion, despite IPS objections, the Indianapolis boundary was extended a few blocks in order to annex land on which a project was proposed (J.A. A15). The court of appeals found that the non-racial justifications HACI offered for placing all projects within IPS did not support that policy (J.A. A15).[13] The courts also noted other racially motivated decisions of

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[11] The court of appeals stated (J. A. A21), "[o]nce the state chose to act [by enacting Uni-Gov] it was obligated to do so in a nondiscriminatory manner."

[12] HACI was permitted by statute to locate projects in the area extending for five miles around Indianapolis (J.A. A13).

[13] In an earlier stage of the case, the court had found that all the nonracial justifications—*e.g.*, the availability of adequate jobs, transportation, and utilities—could be satisfied by sites outside IPS as well as by the sites HACI used within IPS. 541 F.2d at 1216.

the Metropolitan Development Commission (which selected or approved all the proposed sites) and the foreseeable interdistrict racial effects of the site selections to find discriminatory intent (*ibid*).[14]

Petitioners Lawrence, HACI, and Speedway argue that HACI placed all public housing projects within the old city limits (and thus within IPS) not because of discrimination, but because HACI had not entered into "cooperation agreements" with the suburban governments. These agreements, petitioners argue, were necessary to secure federal financing for the projects (Lawrence Pet. 25; HACI Pet. 12–13; Speedway Pet. 18). However, the court of appeals found that the record showed that housing officials, *for reasons of race*, failed to seek such agreements, deciding instead to confine all public housing to IPS boundaries.[15] Accordingly, the petitioners again raise is-

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[14]Petitioner HACI argues (Pet. 11–14) that in finding discriminatory intent, the courts relied solely on the segregative impact of HACI's site selection practices. The court did rely on both the impact and the "striking" pattern of the placements as some proof of discriminatory intent (J. A. A15) However, as explained above, the courts did not rely solely on the effects of the site selection practices to find discriminatory intent.

HACI also argues (Pet. 12) that the courts could not properly rely on the "foreseeable results" of the site selections to support a finding of discriminatory motivation. However, in *Personnel Administrator of Mass.* v. *Feeney*, *supra*, 442 U.S. at 279 n. 25, this Court stated that foreseeable racial consequences are "strong evidence" of discriminatory motivation. The foreseeable consequences of HACI's policies were therefore properly considered.

[15]This finding is significantly buttressed by the earlier finding that since 1969, when as a result of Uni-Gov the housing authority was given county-wide powers and could place projects in suburban areas even without a "cooperation agreement," no projects have been built despite extensive waiting lists of prospective tenants. See 541 F.2d at 1216.

Petitioners Lawrence and HACI erroneously analogize the situation here to the one presented in *James* v. *Valtierra*, 402 U.S. 137 (1971). *James*, they argue, established that because suburban jurisdictions

sues of fact that have been resolved against them by both courts below and do not warrant this Court's review.

2. Both courts reviewed the record on several occasions in light of the guidelines established in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), for identifying and correcting interdistrict effects. The factual findings of interdistrict effect are supported by the record and do not warrant plenary review. Moreover, the court's plan to remedy those effects adequately complies with those guidelines and is not an abuse of discretion.

a. *Uni-Gov and the location of public housing had substantial interdistrict effects.*

Both the court of appeals (J.A. A64) and the district court (J.A. A92) found that by excluding schools from Uni-Gov, the legislature prevented IPS from desegregating its schools by dispersing some of the black student population of the segregated inner city schools into all-white schools in the suburban areas. The courts held that if IPS boundaries had expanded in 1969, IPS would have used the newly annexed areas when desegregating. However, the legislature's discriminatory refusal to expand IPS eliminated this desegregation option, and, the courts found, had the ultimate effect of keeping black students out of suburban schools.[16]

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have no obligation to accept public housing, a refusal to do so is not a Fourteenth Amendment violation (Lawrence Pet. 25; HACI Pet. 14). However, in *James* there was not proof that race was a factor in any governmental decision. 402 U.S. at 141. Here, however, both lower courts found that racially invidious motivation dictated the site selection decisions. The discriminatory exercise of a governmental function may not be excused merely because the function is discretionary. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964).

[16] In its 1973 opinion (368 F. Supp. at 1204) the district court held that the interdistrict effect of Uni-Gov was to prevent IPS from plac-

None of the petitioners challenge these findings. The courts' holdings that IPS would have utilized newly acquired areas are factual conclusions supported by the record. Petitioners argue instead that, contrary to *Milliken* v. *Bradley*, *supra*, the courts were holding that the segregation within IPS alone justified interdistrict relief (Lawrence Pet. 22; Perry Township Pet. 17–18). However, the court of appeals specifically held that the segregation within IPS did not support interdistrict relief (J.A. A16–A18); there has been no misreading of *Milliken*.

The district court's incremental analysis of the interdistrict effects of HACI's discriminatory refusal to place public housing in the suburbs relied on both the number of units in the buildings and the indirect "pull" on black residential movement that would have occurred if the projects had been placed in the suburban areas (J.A. A105–A106, A117–A118). The court of appeals held that while the calculations may not have been mathematically exact, HACI's refusal to place public housing in the suburbs had a significant interdistrict impact (J.A. A23).

This conclusion is correct. If the housing projects had been placed in suburban school districts, the children moving into the projects would have attended suburban schools. There is no evidence that the racial population of the projects would have been any different had they been

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ing black students in suburban areas. It relied on this holding in its 1975 opinion as well (419 F. Supp. at 183). However, in its 1979 opinion, the district court stated that *Dayton I* required specific incremental findings for each violation. Since Uni-Gov was not a localized action, the district court held, its effects could not be "incrementally" calibrated (J.A. A109–A110). The court of appeals corrected this misreading of *Dayton I* (J. A. A20–A22). The exclusion of schools from Uni-Gov was a systemwide rather than localized violation, necessarily having a systemwide impact. See *Columbus Board of Education*, *supra*, 443 U.S. at 466-467; *Dayton II*, *supra*, 443 U.S. at 540–541.

placed in the suburbs—in fact, half the projects were placed within a few blocks of the IPS border (J.A. A15). Although the petitioners make a legal challenge to the use the evidence of housing discrimination (see pages 18–20, *infra*), none now argue that the housing evidence fails, as a matter of fact, to support the finding of an interdistrict racial impact.[17]

b. *The court's plan is tailored to overcome the interdistrict effects of the Uni-Gov and HACI discrimination.*

The court's plan would transfer into the suburban schools sufficient black students from IPS to bring each suburban district to a total enrollment that is 15% black (see pages 3, 5–7, *supra*). Since the courts found that discriminatory acts kept black students within IPS borders and out of suburban areas and schools, the remedial plan is designed to overcome the proven effects of the violations. See, *e.g.*, *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971); *Dayton I*, *supra*. The court's plan also abides by this Court's suggestion in *Milliken* that courts should carefully consider local governmental structure when implementing interdistrict school relief. 418 U.S. at 741–745. The court of appeals upheld the district court's refusal to order that all districts in the county be consolidated. The court of appeals stated that either consolidation or the district court's transfer plan would have been an appropriate remedy, but noted that consolidation "would have been far more intrusive into local political processes" (J.A. A22). Accordingly, in this interdistrict

[17]HACI argues (Pet. at 15) that its housing actions did not increase the number of blacks in IPS. This is not the factual determination to be made. What must be determined is whether, if HACI had acted properly, there would have been more black students than there are now in the suburban schools, and fewer in IPS schools. The courts correctly made this determination.

case there has been no judicial reorganization of local school districts; the plan's effects on local governments are quite limited, and the plan is designed to correct the effects of the proven discrimination.[18]

3. All of the petitioners state that the suburban school officials did not take part in the decisions to locate public housing projects within IPS, and, therefore, the court may not remedy the interdistrict effects of the housing discrimination on school enrollments.

As the petitioners suggest, *Swann* v. *Board of Education*, 402 U.S. 1, 22–23 (1971), expressly did not decide

[18] Cross-petitioner IPS argues that the court of appeals erred in failing to direct the district court to adopt one of the alternative plans proposed by IPS (see page 6, *supra*). IPS argues that the court's one-way transfer plan does not address all the effects of the violations, and unfairly burdens black students.

Although either of the alternative plans would also have addressed the effects of the violation, the court's plan is not so limited as to be an abuse of discretion. In transferring students across the IPS-suburban line, the court's plan will significantly lessen the role that boundary has played as a racial barrier between IPS and many of the suburbs. Since Uni-Gov has created one county-wide city for nearly all other purposes, the piercing of this heretofore significant barrier to integration may encourage residential movement across the line in either direction, by both whites and blacks. Thus, even though the plan tranfers students in only one direction, its impact may prove to be "two-way."

The court of appeals stated that since many white students will probably be reassigned as part of the intradistrict desegregation of IPS, the overall remedial burden may not be unfair (J. A. A23). This likelihood, as well as the fact that the one-way plan will allow IPS to close obsolete schools, suggests that the burden on black students is not so baseless as to constitute abuse of remedial discretion. That suggestion is reinforced by the failure of the parties representing the black students in IPS to object to the court's plan. In addition, since the court of appeals emphasized that the district court could order two-way relief if modifications in the plan become necessary (J. A. A24), the parties are free to move for such modifications if the basis on which the court of appeals rejected the argument of unfair burden proves erroneous, or if different types of unfair burdens become apparent.

Nevertheless, if the Court decides to grant the other petitions, it would be appropriate to grant the cross-petition as well.

"the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." This case does not present the question left open in *Swann*, because it involves state action directed precisely at the schools, not "other types of state action." Moreover, the housing evidence is only one aspect of the state action in this case that was designed to maintain school segregation: the court of appeals considered the history of intradistrict *de jure* segregation, Uni-Gov, and the confinement of public housing within the boundaries of the Indianapolis Public School system as interrelated elements of the violation warranting interdistrict relief.

The district court expressly found that the housing authorities' discriminatory site selections were made with an eye to their effect on school enrollments. "This court * * * specifically holds that the action of [HACI and the Metropolitan Development Commission] in locating such projects within IPS, as well as the opposition of suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only" (J.A. A93–A94). The court of appeals specifically upheld this finding (J.A. A14). In addition, the record establishes that the housing officials considered the effect of the public housing sites on school enrollments (*id.* at A15). That is strong evidence suggesting that the public housing locations' actual effect on the disparate school enrollments between IPS and the suburbs was invidiously intended and was not accidental. Accordingly, rather than presenting

the issue left open in *Swann*, this case presents circumstances which *Milliken* described as an appropriate basis for interdistrict school relief.

Finally, the remedy ordered here is independently supported by the Uni-Gov action (J.A. A26). For that reason, even if this Court were to agree with the petitioners that the effects on schools of housing discrimination may never be remedied by an order affecting schools, the discrimination involving Uni-Gov supports the court's order.

CONCLUSION

The petitions and the cross-petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys

AUGUST 1980.

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

AUGUST 11, 1978

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc., et al., INTERVENING PLAINTIFFS,

Nos. 78–1996 thru 78–2006, and 78–2039

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY INDIANA, AND THE SUPERINTENDENT OF SCHOOLS, PRESIDENT AND MEMBERS OF THE BOARD OF SCHOOL COMMISSIONERS, ET AL., DEFENDANTS-APPELLANTS.

Appeals from the United States District Court
for the Southern District of Indiana,
Indianapolis Div. No. IP 68 C 225
Judge S. Hugh Dillin

ORDER

This matter comes before the court upon the filing of the following documents:

1. The "MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS" filed by the Indianapolis Public Schools on August 2, 1978;

2. The "RESPONSE IN OPPOSITION TO 'MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS'" filed by Metropolitan School District of Lawrence, Warren and Wayne Townships on August 7, 1978;

3. The "MOTION FOR STAY PENDING APPEAL" filed by Metropolitan School District of Perry Township, Marion County, Indiana on August 7, 1978; and

4. The "MOTION OF APPELLANTS, BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR TEMPORARY RETENTION OF RECORD IN DISTRICT COURT UNDER F.R.A.P. 11(c)" filed by Board of School Commissioners of the City of Indianapolis, its Superintendent and members on August 7, 1978.

On consideration thereof, IT IS ORDERED, that this cause be remanded to the district court for the limited purpose of hearing and deciding upon modifications of the July 11th judgment in the nature of alternative remedy, plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing parties) and hearing and making additional findings upon further evidence offered by any parties on the issue of which alternative remedy (including pupil

reassignment, ancillary relief, and allocation of desegregation costs) is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court. Pending the determinations of the district court on this limited remand, and also for the convenience of counsel in preparing their briefs on appeal, the record shall be retained in the district court until further order. All issues raised by the pending appeals, including but not limited, to intent and the existence of any interdistrict violation at all are preserved for decision by this court on the pending appeals and such subsequent appeals as may be filed from the orders of the district court on this limited remand.

This court assumes that the district court will rule upon the various motions for stay of the July 11, 1978 judgment pending appeal prior to the commencement of the 1978–1979 school session. And upon that assumption, this court defers ruling on the motions for stay filed in this court.

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